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In the Supreme Court of the United States

OCTOBER TERM, 1983

MOBIL OIL CORPORATION, ET AL, PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly declined to invalidate a petroleum price control regulation issued nearly 10 years ago and rescinded more than three years ago after concluding that the agency had "good cause" for dispensing with notice and an opportunity to comment at the time the regulation was promulgated.

2. Whether, assuming arguendo that the regulation at issue was procedurally invalid when first promulgated in September 1974, the court of appeals correctly held that the regulation was validly repromulgated in December 1974 following a new notice and comment rulemaking.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A45) is reported at 728 F.2d 1477. The opinion of the district court (Pet. App. A46-A91) is reported at 547 F. Supp. 1246.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1983 (Pet. App. A114). A petition for rehearing was denied on February 10, 1984 (Pet. App. A115). The petition for a writ of certiorari was filed on March 12, 1984. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note, and 28 U.S.C. 1254(1).

STATEMENT

This case concerns petitioners' belated attack on the procedural validity of the so-called "deemed recovery" rule, one of the principal regulations of the petroleum price control program administered by the Department of Energy [1] until controls were terminated on January 28, 1981.[2] Although the deemed recovery rule was promulgated in September 1974, petitioners did not challenge it until 1979. Moreover, not until 8 years after promulgation of the rule, and nearly two years after the end of the price control program, did the district court retroactively invalidate the rule on procedural grounds. During the interim years, literally billions of transactions took place in reliance on the rule, which had been promulgated primarily to protect smaller, independent companies against price discrimination by larger refiners. The court of appeals reversed the district court's invalidation of the rule, holding that it was validly promulgated in September 1974 and, in the alternative, that it was validly repromulgated in December 1974.

1. In November 1973, after the Arab oil embargo caused imported oil prices to rise sharply, Congress

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[1] As used in this brief, "DOE" or "agency" refers to the Department of Energy and the predecessor agencies that administered the petroleum price control program, the Federal Energy Administration, the Federal Energy Office, and the Cost of Living Council.

[2] Petroleum price controls were first promulgated by the Cost of Living Council on August 22, 1973 (38 Fed. Reg. 22536 (1973)), and were terminated by President Reagan on January 28, 1981 (Exec. Order No. 12,287, 46 Fed. Reg. 9909 (1981)).

enacted the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. 751 *et seq.*[3] Regulations promulgated under the EPAA established limitations on the maximum prices that could be charged for sales of covered products.[4] The most important regulatory concept at issue here is the principle of "equal application." This principle was the cornerstone of all of the agency's refiner pricing regulations. Simply stated, "equal application" was designed to ensure that refiners did not discriminate among classes of purchasers (*i.e.*, refiner-owned service stations versus independents) or among regions of the country. The equal application concept was initially promoted by structuring the refiner price rule in such a way that refiners had to maintain their historical price differentials between classes of purchasers whenever they increased prices. See Pet. App. A5-A6. In other words, if a refiner historically charged independents 10 cents less per gallon than it charged its own service stations, any allowable price increases had to maintain that ten-cent differential.[5]

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[3] Authority to promulgate regulations and issue orders under the EPAA expired on September 30, 1981 (15 U.S.C. 760g), but the expiration of that authority did not affect pending cases or the authority to bring new actions based on transactions occurring prior to the expiration date (*ibid.*).

[4] The decision of the court of appeals provides a detailed description of the regulatory framework within which this litigation arose (Pet. App. A4-A13).

[5] If refiners had not been required to maintain their customary price differentials, they would have been able to drive their independent retail competitors out of business by pricing products to them at higher prices than the refiners charged their own retail customers. One of Congress's primary concerns in enacting the EPAA, however, was "to preserve the

2. The "deemed recovery" rule, at the heart of this litigation, was first promulgated in September 1974. 39 Fed. Reg. 32306 (1974). The need for the rule arose when gasoline supplies began increasing and refiners found themselves in a position to sell their products at prices below so-called "base prices" (referred to hereafter for ease of understanding as maximum lawful prices). Because the equal application concept had first been put into the regulations at a time when refiners had no incentive to lower their prices to any of their customers, the agency had not expressly specified that the equal application rules applied to sales *below* maximum lawful prices as well as to sales *at* maximum lawful prices. Thus, the intent of the regulations was ambiguous when selling prices for covered products were below maximum prices, since the refiner price rule did not expressly require refiners either to charge the maximum lawful prices or to apply equally their increased product costs in setting prices that were below the maximum prices. See Pet. App. A6. The result was that some refiners began interpreting the price regulations as allowing them to discriminate among their customers by selectively charging prices below maximum lawful prices to some customers, while charging other customers the maximum lawful price. See 39 Fed. Reg. 32307 (1974).

The deemed recovery rule was designed to correct this situation by making the equal application con-

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competitive viability" of the independent sector. See 15 U.S.C. 753(b)(1)(D). In addition, Congress wanted to ensure equitable distribution and equitable prices among all regions of the country (15 U.S.C. 753(b)(1)(F)), and the equal application principle fostered that goal as well.

cept explicitly applicable to all price changes, whether below or at maximum prices. Pet. App. A9. The rule did not make equal application mandatory, but it created a strong economic incentive to maintain historical price differentials by providing that a refiner would be "deemed" to have recovered the highest price increase charged to any class of purchaser from *all* classes of purchasers. *Id.* at A10-A11. Thus, if a refiner passed through increased costs of five cents to one customer, but only three cents to another customer, it would be deemed to have passed through five cents of increased costs to both customers.

The deemed recovery rule was promulgated on September 5, 1974, without prior notice and comment. 39 Fed. Reg. 32306 (1974). The agency found "good cause" for dispensing with notice and comment because advance announcement of a proposed deemed recovery rule, followed by a comment period, would only alert those refiners who had not previously been aware of the ambiguity in the regulations to its existence, thereby encouraging them to enter into long-term contracts in violation of the equal application principle during the pendency of the rulemaking. *Id.* at 32307.[6] Accordingly, the agency announced

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[6] For example, Texaco stipulated, in litigation challenging the validity of the deemed recovery rule, that prior to September 1, 1974, it had construed the regulations as requiring equal application of costs in selling prices below maximum lawful prices. *Texaco, Inc.* v. *Dep't of Energy*, C.A. No. 80-18 (D. Del. Feb. 4, 1982) (R. 1155). The agency did not want to alert such companies to the possibility that equal application was not required, for at least some of them might well have undertaken predatory activities. Indeed, even after the rule was promulgated, Texaco proceeded to engage in discriminatory pricing against west coast independents. See *McWhirter Distributing Co.* v. *Texaco, Inc.*, 668 F.2d 511 (Temp. Emer. Ct. App. 1981).

that written and oral comments on the deemed recovery rule would be accepted in public hearings to be held later in September. *Ibid.*

Five days later, on September 10, 1974, the agency published a notice of proposed rulemaking containing numerous proposals to revise the price regulations. 39 Fed. Reg. 32718 (1974). In that notice, the agency proposed replacing its equal application rules, including the deemed recovery rule, with a package of amendments extending to refiners greater pricing flexibility than was provided by the deemed recovery rule, while continuing to protect independents in other ways. *Id.* at 32722-32723. The notice solicited comments on the agency's proposed amendments and, by reference, on the deemed recovery rule they would replace. *Ibid.*

On December 5, 1974, after receiving 1,500 pages of comments and oral testimony on both the September 5 and September 10 notices, the agency issued several regulatory amendments. 39 Fed. Reg. 42368 (1974). With respect to the proposal to replace the deemed recovery rule with an alternative that would have permitted greater pricing flexibility, the agency announced that it was deferring action "until a later date." *Ibid.* The agency thus repromulgated the September 5 deemed recovery rule as part of the overall refiner pricing rule effective December 5, 1974. *Id.* at 42372.

3. On March 5, 1975, the Senate Committee on Interior and Insular Affairs favorably reported to the full Senate a bill amending and extending the EPAA. The bill was enacted on December 22, 1975, as the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871. The committee's report on the bill addressed amendments considered but rejected by the

committee, including one amendment that would have made equal application of increased costs a statutory requirement. After hearing testimony on the need to maintain and enforce customary price differentials (see, *e.g.*, *Standby Energy Authorities Legislation: Hearing on S. 620 and 622 Before the Sen. Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 134-135 (1975)), the committee rejected this proposed amendment. The committee's reasons were two: the amendment's stated goal of ensuring "the maintenance of customary differentials in price" already was required by the "purpose and intent" of the EPAA, and the refiner pricing regulations already in effect accomplished that statutory goal. S. Rep. 94-26, 94th Cong., 1st Sess. 37-38 (1975).[7]

4. a. Although the deemed recovery rule was promulgated in 1974, petitioners did not file suit to overturn the rule until 1979, when the price control program was winding down. Petitioners then waited until October 1981, a month after the expiration of the EPAA, which was the agency's sole statutory authority for promulgating the challenged rule, to file a

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[7] Although the committee in its report did not refer to the "deemed recovery rule" by name, that rule was the agency's only regulation providing for the maintenance of customary price differentials when selling prices were below maximum lawful prices. Thus, the committee's reference to the agency's "regulations providing for the maintenance of relative price differentials among classes of purchaser" (S. Rep. 94-26, *supra*, at 38) was plainly a reference to the deemed recovery rule.

The House of Representatives also was aware that the deemed recovery rule had been promulgated but did not seek to alter or rescind it. See H.R. Rep. 94-340, 94th Cong., 1st Sess. 51-52 (1975).

motion for summary judgment.[8] The United States District Court for the Northern District of New York first rejected the agency's defense of laches. The court then invalidated the deemed recovery rule based on its conclusion that there was no emergency in September 1974 and that even if the agency's publication of prior notice would precipitate injury to the public welfare, that fact would not justify the agency's waiver of notice and comment procedures. Pet App. A88-A89. The court also rejected DOE's argument that the rule was validly repromulgated on December 5, 1974, because it felt that the September 10 notice of proposed rulemaking had not adequately informed interested persons that the agency was interested in reevaluating the rule (*id.* at A89-A90).

b. Naph-Sol Refining Company, the respondent in No. 83-1509, filed suit against Murphy Oil Corporation in January 1979 to recover overcharges under Section 210 of the Economic Stabilization Act, 12 U.S.C. (1976 ed.) 1904 note. Murphy's defense included a claim that the deemed recovery rule had been improperly promulgated and was void ab initio. Shortly after the district court in the present action issued its decision in favor of petitioners, the United States District Court for the Western District of Michigan granted summary judgment to Murphy.

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[8] Ironically, petitioner Mobil had previously persuaded another judge of the same district court to invalidate a New York state tax statute because of a conflict with the deemed recovery rule. *Mobil Oil Corp.* v. *Tully*, 499 F. Supp. 888 (N.D. N.Y. 1980), aff'd, 653 F.2d 497 (Temp. Emer. Ct. App. 1981), vacated and remanded on other grounds, 455 U.S. 245 (1982). Thus, Mobil's action here is an attempt to persuade the courts to declare the deemed recovery rule void ab initio after persuading the same courts to declare the New York statute void because it conflicted with the deemed recovery rule. See Pet. App. A23 n.15.

Like the district court here, the court held that no emergency existed in September 1974 sufficient to justify the agency's use of "good cause" rulemaking procedures. *Naph-Sol Refining Co.* v. *Murphy Oil Corp.*, 550 F. Supp. 297 (W.D. Mich. 1982) (Pet. App. A106-A107). The court also invalidated the rule as repromulgated on December 5, 1974, because in its view the preamble did not include an adequate statement of the basis and purpose of the rule. *Id.* at A110.

5. The court of appeals consolidated the two district court decisions and reversed both of them. Pet. App. A1-A45.[9] TECA first concluded that the defense of laches was available to the agency in the instant case and further observed that (*id.* at A23 (footnote omitted)):

> Many of DOE's arguments with respect to delay and prejudice, on their face, are impressive. First, and most significantly, is the obvious fact that Mobil's procedural challenge is brought some five years after the fact of promulgation. Mobil and other oil companies promptly challenged other regulations issued at essentially the same time as the deemed recovery rule and there has been no satisfactory explanation of why, in this case, there was a delay. This is particularly significant here since the judicial review provision in § 211 of the Economic Stabilization Act, 12 U.S.C. § 1904 note, was expressly designed to ensure prompt review of agency action. *See* S. Rep. No. 92-507, 92nd Cong., 1st Sess., *reprinted*

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[9] DOE participated in the court below as amicus curiae in support of Naph-Sol's position (Pet. App. A3). Because the issues raised by Murphy in No. 83-1509 are so closely related to those raised by petitioners here, we address in this response the contentions advanced in both petitions.

> *in* 1971 U.S. Code Cong. & Ad. News 2283, 2292-93.
>
> The apparent effects of the delay are considerable. DOE would now be unable to cure any procedural [infirmity] by repromulgating the deemed recovery rule. It is arguable that invalidation at this juncture would run afoul of congressional intent with respect to petroleum pricing in the period of controls. There is some evidence that Congress never explicitly enacted equal application legislation because, in part, the deemed recovery rule existed. *See* S.Rep. No. 94-26, 94th Cong., 1st Sess. 37-38 (1975). Moreover, invalidation could be seen as prejudicing those refiners who had set their prices in accordance with the rule. Finally, the lost time and expense of DOE's ongoing enforcement actions is to be considered.

Nevertheless, TECA did not rest its decision in this case on laches because it concluded that Murphy, in the consolidated private action, was entitled to raise the alleged invalidity of the deemed recovery rule as a defense to Naph-Sol's action for overcharges. Pet. App. A24. Accordingly, TECA proceeded to address the merits in both cases. It affirmed the procedural validity of the September 5 deemed recovery rule, holding that, both as a matter of law and fact, the agency had good cause under the Administrative Procedure Act, 5 U.S.C. 553(b)(B), and the Federal Energy Administration Act, 15 U.S.C. (1976 ed.) 766(i)(1)(B), for waiving prior notice and comment (Pet. App. A25-A34). TECA held that if an agency reasonably concludes that the announcement of a proposed rule itself could precipitate significant harm to the public welfare, good cause exists to waive prior notice and opportunity to comment (*id.* at

A29). And, after reviewing the record, TECA concluded that it was "unable to say that the [agency's] judgment that notice would lead to price discrimination and pressure on independents and regions was unreasonable" (*id.* at A31).

TECA also upheld the procedural validity of the deemed recovery rule as repromulgated on December 5, 1974. It found that the September 10 notice of proposed rulemaking was adequate to alert interested parties that the deemed recovery rule was under review and that the agency was willing to reevaluate the rule (Pet. App. A36). Finally, the court held that the agency's statement of basis and purpose for the December 5 rule was adequate to permit the court to discern the agency's path (*id.* at A39). Although acknowledging that the statement was not a model of clarity, TECA was "disinclined, some eight years after the event, to invalidate a rule on the technical ground of a deficient statement of basis and purpose when we can fairly discern the agency's aim" (*ibid.*).[10]

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. The issues are unlikely to recur, since TECA has decided only narrow questions concerning the procedural validity of an emergency regulation promulgated nearly 10 years ago in the

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[10] Subsequent to TECA's decision, two district courts have issued decisions upholding the substantive and procedural validity of the deemed recovery rule as promulgated on September 5, 1974. *Go-Tane Service Stations, Inc.* v. *Clark Oil Refining Corp.*, No. 79-C-1674 (N.D. Ill. Jan. 16, 1984); *Martin Oil Service, Inc.* v. *Koch Refining Co.*, No. 81-C-1844 (N.D. Ill. Feb. 1, 1984).

formative period of an emergency oil price control program that was terminated more than three years ago. Moreover, as this Court has observed, TECA was established by Congress to ensure expert and uniform treatment of energy issues, and it is "a court intimately familiar with the intricacies of federal energy regulation." *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982). TECA carefully and thoroughly considered petitioners' arguments, and it rejected them in a thoughtful, unanimous decision. In these circumstances, further review is unwarranted.

1. Petitioners urge that the agency was not justified in waiving notice and opportunity to comment on the September 5 deemed recovery rule (Pet. 9-17; 83-1509 Pet. 17-19). But the general notice and comment requirements of the APA may be waived "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest" (5 U.S.C. 553(b)(B)). Similarly, the notice and comment requirements of the Federal Energy Administration Act (FEAA) may be waived when strict compliance would "cause serious harm or injury to the public health, safety, or welfare" (15 U.S.C. (1976 ed.) 766(i)(1)(B)). TECA's decision with respect to the procedural requirements of the FEAA, however, is of purely academic interest since those procedural provisions were repealed in 1977, prior to the institution of this action (see Pub. L. No. 95-91, § 709(a), 91 Stat. 608), and replaced with a requirement for showing only a likelihood of such adverse effects (see 42 U.S.C. (Supp. V) 7191(e)). In any event, even as they apply to the APA, petitioners' contentions are without merit.

a. TECA correctly concluded that the agency validly promulgated the deemed recovery rule in September 1974 without prior notice and opportunity to comment because of the agency's conclusion that a notice of proposed rulemaking advertising the gap in the agency's equal application requirements threatened to precipitate the very discriminatory pricing that Congress directed the agency to foreclose by appropriate regulations (see page 4 note 5, *supra*). Petitioners do not seriously dispute the proposition that regulations may be promulgated without prior notice and opportunity to comment under the "good cause" exception of the APA when such prior notice would precipitate conduct by regulated parties that is "contrary to the public interest." As TECA has held in the past, good cause exists when an announcement of future regulations might itself cause the very harm the regulations were intended to avert. *Nader* v. *Sawhill*, 514 F.2d 1064, 1068 (Temp. Emer. Ct. App. 1975); *DeRieux* v. *Five Smiths, Inc.*, 499 F.2d 1321, 1332 (Temp. Emer. Ct. App.), cert. denied, 419 U.S. 896 (1974); see also *Metzenbaum* v. *Edwards*, 510 F. Supp. 609, 613 (D.D.C. 1981).[11] TECA's con-

[11] In *Nader* v. *Sawhill*, TECA upheld the agency's waiver of notice and comment because " 'the announcement of a price increase [in the "old oil" ceiling price] at a future date could have resulted in producers withholding crude oil from the market until such time as they could take advantage of the price increase' " (514 F.2d at 1068 (citation omitted)). In *DeRieux* v. *Five Smiths*, TECA upheld the President's failure to provide advance notice and comment when he promulgated a 90-day freeze on prices, rents, wages, and salaries because, "[h]ad advance notice issued, it is apparent that there would have ensued a massive rush to raise prices and conduct 'actual transactions'—or avoid them—before the freeze deadline" (499 F.2d at 1332).

clusion fits comfortably within the plain language of the APA permitting waiver of notice when "the agency for good cause finds * * * that notice and public procedure thereon are * * * contrary to the public interest." [12]

b. Petitioners' disagreement with the decision below is, in reality, a disagreement with TECA's conclusion that the facts available to the agency in 1974 supported the agency's predictive judgment that prior notice "would lead to price discrimination and pressure on independents and regions" (Pet. App. A31). But the agency's conclusion involved, as TECA noted, "subjective" judgments entitled to "special deference," involving as they did deductions based on the agency's "expert knowledge" (Pet. App. A30-A31). TECA's approach follows this Court's teachings that heightened judicial deference is to be accorded agency judgments on economic matters so long as the agency acts reasonably. See, *e.g.*, *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 169-170 (1982); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413-414 (1958); *Board of Trade* v. *United States*, 314 U.S. 534, 548 (1942); cf. *Baltimore Gas & Elec-*

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[12] Petitioners suggest (Pet. 15; 83-1509 Pet. 18-19) that the agency should have announced a proposed rule that, if promulgated after notice and comment, would take effect retroactively as of the date of the initial announcement. Petitioners would require the agency to proceed in this manner even if the agency finds good cause to waive notice and comment, thereby effectively repealing the good cause exception in the APA and replacing it with their own alternative procedure. As TECA noted (Pet. App. A32-A33 n.21), such additions to the procedural requirements of the APA are forbidden by this Court's decision in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

tric Co. v. *Natural Resources Defense Council, Inc.*, No. 82-524 (June 6, 1983) (deferring to expert scientific prediction made by the Nuclear Regulatory Commission). Such a deferential standard of review is particularly appropriate in this case, where petitioners are asking the courts to substitute their economic judgment for the one the agency made 10 years ago. As TECA explained (Pet. App. A31):

> Although September 1974 was a period of increasing oil supply, it was still a volatile time, not that far removed from the Arab oil embargo of fall 1973, and far distant from the relative stability in the oil market of 1979 or 1983. Given the changed market conditions in late summer 1974, the relatively recent awareness that this was encouraging selective cost banking, and the policy of preserving the class of purchaser scheme, we are unable to say that the [agency's] judgment that notice would lead to price discrimination and pressure on independents and regions was unreasonable. It is easy, in retrospect, to state that [the agency's] fears were exaggerated. [The agency], however, was in a better position in August 1974 to appreciate the economic dynamics of the oil industry at that time than the courts are today; we must avoid being hampered by 20/20 hindsight.

Moreover, as TECA correctly noted, the agency's predictive judgment was clearly supported by events at the time (Pet. App. A32 (footnote omitted)):

> None of the oil companies, who were not reluctant to challenge regulations, rejected the [agency's] good cause argument by attacking the procedural validity of the deemed recovery rule in 1974 or 1975. This gives some credence to the [agency's] predictive judgment and finding of

> good cause. So, too, do the numerous comments independents submitted to the [agency] in response to the [agency's] concern that independents and regions were susceptible to discriminatory pricing.

In short, petitioners' disagreement with TECA's assessment of the facts confronting the agency 10 years ago presents no issue requiring this Court's review.[13]

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[13] Petitioners argue (Pet. 13; 83-1509 Pet. 20-21) that the deemed recovery rule was superfluous because protection from discrimination already was afforded both by a general anti-discrimination provision in the agency's regulations (10 C.F.R. 210.62(b) (1975)) and by the federal antitrust laws. But notwithstanding the existence of such general prohibitions against discriminatory pricing, Congress expressly directed the agency to guard against discriminatory pricing in the sale of oil (see page 4 note 5, *supra*). Accordingly, it is not surprising that TECA declined to second guess the agency's conclusion that in the circumstances prevailing in 1974, general prohibitions against discriminatory pricing were insufficient to protect the public interest.

Petitioners also fault TECA for reviewing the adequacy of the September 5 statement of good cause in the light of the September 10 notice of proposed rulemaking (Pet. 14-15; 83-1509 Pet. 14-17). But the basic statement that the agency was adopting the deemed recovery rule without prior notice in order to avoid precipitating price discrimination was clearly expressed in the September 5 notice. 39 Fed. Reg. 32307 (1974). The September 10 notice merely discussed the pros and cons of the rule and noted that the rule served to protect both independents and regions of the country from price discrimination. *Id.* at 32722-32723. Accordingly, TECA correctly concluded that "[t]he September 10 notice was a contemporaneous statement of the agency's views, and not within the 'made for litigation' rationalization proscribed by *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947)" (Pet. App. A33).

2. TECA's holding that the agency satisfied the "good cause" standard for waiving notice and comment on the September 5 rule fully disposes of this case. Nevertheless, TECA also held, in the alternative, that the deemed recovery rule was validly repromulgated on December 5, 1974, *after* notice and opportunity to comment. This rulemaking, which was announced in the September 5 rulemaking and the September 10 notice of proposed rulemaking, featured a 30-day comment period and three days of oral hearings that resulted in 1,500 pages of written and oral comments, including comments from all of the petitioners (see Pet. App. A36 n.24).

a. In the September 10 notice, the agency devoted considerable effort to outlining various options for replacing or modifying all of its equal application regulations, including the deemed recovery rule. The agency solicited comments on these proposals, including a proposal to withdraw the deemed recovery rule and to allow unequal allocation of cost increases within recognized marketing areas, provided that independents be given most favored customer treatment (39 Fed. Reg. 32727 (1974)), and a proposal to allow up to 10% of costs to be allocated unequally *among* regions (*ibid.*). The September 10 notice easily satisfied the APA's requirement that the notice include "either the terms or substance of the proposed rule or a description of the subjects and issues" (5 U.S.C. 553(b)(3)). Moreover, since the agency published notice of the exact terms of the proposed rules, the notice also satisfied the FEAA's requirement that notice "shall be given by publication of [the] proposed rule." 15 U.S.C. (1976 ed.) 766(i)(1)(B).

Nonetheless, petitioners appear to contend (Pet. 17) that regardless of the adequacy of the "notice and public procedure thereon," an agency can *never* repromulgate a rule if the original promulgation was procedurally defective. This novel argument finds no support whatsoever in the express terms of the APA or the FEAA, which set forth the only procedural requirements that the agency must satisfy. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). Moreover, petitioners' argument is wholly illogical, since it would mean that an agency can never cure procedural defects in a rule even if it concludes, after hearing all the evidence, that the rule is the most appropriate solution to the problem at hand. Nor is petitioners' argument supported by any of the cases they cite (Pet. 17-18), which merely hold that notice and comment proceedings after the adoption of a rule are insufficient to validate the rule retroactively. The cases say nothing about the issue here, which is whether a rule may be repromulgated on a purely prospective basis after notice and comment. Thus, the only effect of TECA's alternative holding is that a valid deemed recovery rule was promulgated on December 5, 1974, even if the September 5, 1974 rule was invalid.

Petitioners also contend (Pet. 18) that the September 10 notice reflected an unwillingness on the part of the agency to reevaluate the deemed recovery rule; petitioners rely on the notice's statement that "to the extent that the current requirement serves to protect the independent sector of the market, [the agency] has concluded that it must be retained" (39 Fed. Reg. 32723 (1974)). When this statement is read in context, however, it becomes clear, as TECA correctly concluded, that the statement merely "re-

veal[ed] that the [agency] indeed was committed to protecting independents" in some fashion (Pet. App. A36). Indeed, even petitioners admit (Pet. 18) that the agency's proposed regulations published along with the September 10 notice would have deleted the deemed recovery rule entirely (see Fed. Reg. 32726-32731 (1974)). Finally, as TECA held, review of the comments filed in response to the September 10 notice "convinces us that interested parties did not believe that the [agency's] mind was closed" (Pet. App. A36). In short, petitioners had ample opportunity to urge the repeal of the rule, and the agency evidenced complete willingness to consider their arguments.

b. TECA's holding that the agency's statement of basis and purpose accompanying the December 5 repromulgation of the deemed recovery rule was adequate does not warrant review by this Court. The basis and purpose of the rule—Congress's mandate that there be no price discrimination—has been evident to all since the fall of 1974. Indeed, petitioners themselves acknowledge that the purpose of the rule was crystal clear (Pet. 3-4; see also 83-1509 Pet. 6-7).

As TECA noted (Pet. App. A39), the September 10 notice of proposed rulemaking "canvassed in some detail the opposing policy considerations involved" in the decision to repeal or retain the deemed recovery rule. Thus, despite the brevity of the December 5 statement of basis and purpose, the agency's "reason for retaining the deemed recovery rule [was] reasonably clear: the agency concluded that the needs of regions and independents outweighed the benefits of price flexibility" for refiners (*ibid.*).

All of the purposes of a statement of basis and purpose as required by the APA, 5 U.S.C. 553(c), were served in this case. Affected parties understood

the agency's rationale for the rule, and the agency's statements and the administrative record furnished ample material for adequate judicial review (see Pet. App. A37-A39). See *Action on Smoking & Health* v. *CAB*, 699 F.2d 1209, 1215-1216 (D.C. Cir. 1983); *Baltimore & Ohio Chicago Terminal R.R.* v. *United States*, 583 F.2d 678, 687-688 (3d Cir. 1978), cert. denied, 440 U.S. 968 (1979); *Tabor* v. *Joint Board for Enrollment of Actuaries*, 566 F.2d 705, 710 (D.C. Cir. 1977). Moreover, the statement of basis and purpose may be brief and general, *New York Foreign Freight Forwarders & Brokers Ass'n* v. *Federal Maritime Comm'n*, 337 F.2d 289, 296 (2d Cir. 1964), cert. denied, 380 U.S. 910 (1965), and even the absence of a statement of basis and purpose is not fatal when the purpose is obvious. *Hoving Corp.* v. *FTC*, 290 F.2d 803, 807 (2d Cir. 1961). Since even eight years later TECA could readily discern the path followed by the agency and the rationale for its action, the court properly held that the statement was sufficient. Pet. App. A38-A39; accord, *Alabama Ass'n of Insurance Agents* v. *Board of Governors of the Federal Reserve System*, 533 F.2d 224, 237 (5th Cir. 1976), amended on other grounds, 558 F.2d 729 (1977), cert. denied, 435 U.S. 904 (1978).[14]

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[14] This case is not at all simliar to *Motor Vehicle Manufacturers Ass'n of the United States, Inc.* v. *State Farm Mutual Automobile Ins. Co.*, No. 82-354 (June 24, 1983), or *International Ladies' Garment Workers' Union* v. *Donovan*, 722 F.2d 795 (D.C. Cir. 1983), upon which petitioners rely. In both cases, agency action taken after notice and comment was held to be arbitrary and capricious because the agencies had failed to provide any reasons whatsoever for certain aspects of the actions they had taken. As we have noted above, however, in this case it has always been abundantly clear, both to petitioners and to the reviewing courts, why the agency acted as it did in promulgating the deemed recovery rule.

3. As we have shown, TECA's decision is fully consistent with the requirements of the APA and does not raise any issue requiring this Court's review. It bears repeating, however, that this case involves a belated procedural challenge to regulations promulgated nearly 10 years ago under a program terminated more than three years ago. In this context, petitioners' concern (Pet. 7-8) that the decision below "will stand as an open invitation for agencies to ignore rulemaking procedures" lacks credence. TECA carefully limited its decision to the unique situation before it—belated review of a rulemaking that occurred during a time of extreme volatility in an industry vital to the national interest. As TECA recognized (Pet. App. A39), it is now time to lay this matter to rest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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